No. 86-6169

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM WAYNE THOMPSON, Petitioner

v.

STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT

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BRIEF OF THE RESPONDENT
STATE OF OKLAHOMA

STATEMENT OF THE CASE

William Wayne Thompson,[1] hereinafter referred to as the petitioner, was convicted by a jury for the crime of murder in the first degree in violation of Okla. Stat. Ann. tit. 21, § 701.7 (West 1983) in the District Court of

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[1] Thompson was born on March 4, 1967. The murder for which he was convicted occurred on January 23, 1983. Therefore, Thompson was approximately fifteen years, ten and one-half months old at the time of the crime (R.479).

Grady County, State of Oklahoma.

The original information was filed against Bobby Joe Glass, Anthony James Mann, Richard Jones, and the petitioner, who was initially listed in the information as an unnamed juvenile under the age of eighteen (R. 1).

After a certification hearing, the court made findings, and ordered the petitioner to stand trial as an adult on April 21, 1983. That order was affirmed by the Court of Criminal Appeals on January 11, 1984, in an unpublished opinion (R. 634-35). After his certification, the petitioner was prosecuted as an adult defendant (R. 31). The State filed bills of particulars asking for the death penalty against each of the defendants (R. 10, Tr. 86-89). The case of the four defendants was severed for trial, and the petitioner was tried by himself.

At the conclusion of the first stage of the trial, the jury found the petitioner guilty of murder in the first degree and at the conclusion of the second stage of the trial, the jury imposed the death sentence upon the petitioner. The jury found the existence of one aggravating circumstance, that the murder was "especially, heinous, atrocious, or cruel," and rejected a second one, that there existed a probability that the petitioner would commit criminal acts of violence that would constitute a continuing threat to society (J.A. 20; Tr. 870). The trial court sentenced the defendant in accordance with the jury's verdict. The petitioner's conviction was affirmed in Thompson v. State, 724 P.2d 780 (Okla. Crim. App. 1986).

I. The Facts Presented at the Certification Hearings.

The certification hearing was divided into two parts. The prosecutive merit hearing was held on March 29, 1983 and the hearing on amenability to the juvenile system was held on April 21, 1983.

At the prosecutive merit hearing, the State called five witnesses: a pathologist who testified concerning the cause of death (P.M.Tr. 11), two witnesses who testified concerning the recovery of the body (P.M. Tr. 40-48, 60-67), and two witnesses who heard the petitioner say that he murdered the victim, Charles Keene (P.M.Tr. 16-19, 48-50).

At the conclusion of the hearing, the court found that there was prosecutive merit to the charge of murder in the first degree (P.M.Tr. 67). The court also ordered that another hearing be conducted to determine whether the

petitioner was amenable to the juvenile system, or whether he should be certified to stand trial as an adult (P.M. Tr. 67).

At the certification hearing on April 21, 1983, Dr. Helen Kline, a clinical psychologist at Central State Hospital in Norman, who also maintained a private practice, testified that she examined the petitioner in the Grady County jail on two occasions. (C.Tr. 7-8). She gave him the Minnesota Multiphasic Personality Inventory test, the Rorschach test, the Bender-Gestalt test (to determine whether e petitioner had organic impairment), and the Wide-Range Achievement test (which measures level of education, reading, spelling, and arithmetic). (C.Tr. 9).

Dr. Kline testified that in her opinion the petitioner understood the difference between right and wrong, and that he had an antisocial personality.

(C.Tr. 9). She stated that she did not believe his personality could be modified, that his contact with law enforcement became progressively more severe, and that his behavior had become more anti-social. (C.Tr. 10-11). Dr. Kline testified he would become more of a threat to the community and more violent. (C.Tr. 11). She testified that the petitioner was street-wise, and that he assumed that because he was sixteen years old he was outside any severe penalties of the law, and he did not believe that there would be severe repercussions resulting from his behavior. (C.Tr. 11).

A copy of a psychological report she prepared was admitted as Exhibit 11. (C.Tr. 12-14). The report noted the types of tests given to the petitioner and that there was no evidence of organic impairment or psychotic process in the test data.

On cross-examination Dr. Kline stated that the petitioner had no evidence of organic impairment or schizophrenia and that the MMPI and the Rorschach tests would have been sensitive to any thought disorders. (C.Tr. 25).

The second witness was Detective Kenneth Reed of the Chickasha, Oklahoma Police Department. Detective Reed testified that he had come in contact with the petitioner during a burglary interview, and that the petitioner did not seem to fear any consequences of the crime (C.Tr. 28).

A woman named Margaret Lee Kirk testified that she and her husband operated the Stork Club. On February 2nd or 3rd of 1983 (approximately one week after the murder of Charles Keene), the petitioner came into that establishment (C. Tr. 40-41). When Ms. Kirk told him to leave, he stated "If I'm big enough to kill, I'm big enough to drink beer." (C.Tr. 41).

The next witness was Ronald Esmond, a captain with the Chickasha Police Department, who testified about responding to a call at the petitioner's residence on October 7, 1981 (C.Tr. 43). He testified concerning the petitioner's loud, combative and abusive behavior. The petitioner's mother advised Esmond that the petitioner was a run-away, and that she wanted him taken out of the house. Captain Esmond also testified that at the time the petitioner appeared to be intoxicated. (C.Tr. 43).

The next witness was John Ladado, a police officer with the Chickasha Police Department who testified that on February 7, 1983, he saw the petitioner staggering across the street. (C.Tr. 45-46). When Ladado approached him, the petitioner stated that his name was William Wayne Thompson and that he was a juvenile. Ladado arrested the petitioner for public intoxication. He said that

the petitioner was cocky, and did not want to answer any questions at the booking. (C.Tr. 46).

Ladado also testified that when he transferred the petitioner to the county jail, the petitioner told Ladado to shoot him, because "you'll have to some day, fucker." (C.Tr. 47). The petitioner also advised Ladado and a Sergeant Quinton that they would be dead. (C.Tr. 47).

Michael Bradley, an assistant district supervisor for Court Related Community Services for the Department of Human Services, testified concerning placement options in the juvenile system for the petitioner.

Mary Robinson, who was also employed by the Department of Human Services Court Related and Community Services, testified that she came in contact with the petitioner on the following occasions: (1) August of 1980 for assault and battery; (2) October of 1981 for assault and bat-

tery; (3) May of 1982 for vandalism; (4) May of 1982 for attempted burglary; (5) July of 1982 for assault and battery with a knife; (6) December of 1982 for inhalation of toxic vapors; (7) February of 1983 for public intoxication; and (8) February of 1983 for assault with a deadly weapon. (C.Tr. 51-54).

Ms. Robinson testified that the petitioner had been provided counseling sessions with professionals, and with Youth Services. She stated that he had been placed in the Boy's Ranch Town, a church home in Oklahoma City, but refused to return after he was home on leave. (C.Tr. 54).

She testified none of the counseling or placements with the Department of Human Services seemed to improve the petitioner's behavior, and that she did not think the Department of Human Services had any services from which the petitioner could benefit. The petitioner in her

opinion, was not amenable for rehabilitation within the juvenile system. (C.Tr. 54-55). Ms. Robinson stated that the petitioner should stand trial as an adult. (C.Tr. 55).

Ms. Robinson also testified that she had monitored the petitioner's attitude in jail after he was arrested for murder in the present case. The petitioner seemed unconcerned about what had happened, and did not show any remorse. (C.Tr. 55). A certification study she had prepared was introduced into evidence as Exhibit 12 (C.Tr. 55-56).

The certification study listed the petitioner's contacts with the juvenile system as set forth above. The report noted that the act that the petitioner committed in the present case showed sophistication and maturity beyond the age of 15.9. The report stated that because of the act and the petitioner's prior delinquent history, it was unreal-

istic to believe that he would benefit from the services offered by the Department of Human Services, and it recommended that he be certified to stand trial as an adult.

The petitioner produced two witnesses. His half-sister described his family life, testified that the petitioner had minded her, and stated that he was not violent until he started sniffing paint. (C.Tr. 62-70). The petitioner's former attorney testified concerning the positive relationship he had had with the petitioner. (C.Tr. 76-87).

At the conclusion of the hearing, the court made findings with regard to the six statutory guidelines set forth in Okla. Stat. Ann. tit. 10, § 1112(b), (West Supp. 1987) and ruled that he should be certified to stand trial as an adult and be held accountable for his actions as if he were an adult. (C.Tr. 107-09). A written order to that effect was also filed (J.A. 5-8).

II. The Facts Presented at Trial.

This case concerned the abduction and murder of one Charles Keene during the early morning hours of Sunday, January 23, 1983. The evidence revealed that Anthony James Mann, Bobby Joe Glass, Richard Jones, and the petitioner took Keene from a trailer in Amber, Oklahoma, and eventually transported him to a location on the banks of the Washita River. They murdered him there, and then deposited his body in the river after wrapping a chain and a concrete block

The petitioner was the younger brother of co-defendant Anthony Mann. He was living with his mother, Dorothy Thompson, his father, and his brother and sisters in Chickasha, Oklahoma. Bobby Joe Glass, and Glass's girlfriend, Charlesetta Garcia, and her two children, also resided at the Thompson residence (Tr. 509, 594, 631, 702-03).

The petitioner had another half-brother, Danny Mann, and a half-sister, Vicky Mann, the ex-wife of the victim, Charles Keene (Tr. 588, 714). Vicky shared the trailer house at Amber, Oklahoma, with the victim (Tr. 587, 591), and it was the conflict between her and Keene that led to his murder.

Vicky married Charles Keene in 1974, and divorced him three years later (Tr. 588). While they were married they had one child. After they were divorced they continued to cohabit and had another child (Tr. 588, 591).

Vicky's relationship with Charles Keene was bitter and violent, and she testified that he was a paint sniffer (Tr. 611-12). Vickie lived with Charles after the divorce only because he threatened to disfigure her if she saw another man (Tr. 591). On occasion, she would make him leave, but he would return (Tr. 604). Charles occasionally beat up

the petitioner and Vicky's younger sister (Tr. 614).

Vicky testified that on the Friday preceding the murder, Charles beat her up at Dorothy Thompson's house (Tr. 612). The turmoil spilled over into the next day when Vicky, Danny Mann, and Anthony Mann went to Amber to get Vicky's car, which Charles had taken back to the trailer house (Tr. 588-89, 614). They found Charles sniffing paint in the trailer.

An altercation ensued, during which Danny and Anthony eventually got the keys out of Charles's pocket. Charles then grabbed a kitchen knife and chased them out of the house (Tr. 589, 717).

Vicky Keene spent the night at the Thompson home, and went to bed at some-time between nine or ten that evening (Tr. 594).

The petitioner's girlfriend, Donetta Bradford also spent the night at the

Thompson residence as a guest of the petitioner's younger sister, Cindy (Tr. 683-84). That evening, when the petitioner, Donetta, Cindy, and another person named Stacy Knight were congregated in a bedroom in the Thompson house, the petitioner stated, "we're going to kill Charles." (Tr. 685). He then took a coat from the closet and left (Tr. 685-86).

Charlesetta Garcia, Glass's girlfriend, was also spending the night at the Thompson residence on January 22, 1983. She testified that Anthony Mann, Richard Jones, Bobby Glass and the petitioner were all present that evening, and left together, taking Stacy Knight with them (Tr. 631-32).

During that same night at approximately 2:25 a.m. Malcolm ("Possum") Brown was awakened by the sound of a gunshot that came from his front porch. Mr. Brown lived two miles north of Chickasha,

Oklahoma (Tr. 468). Brown knew Bobby Glass and Charles Keene (Tr. 479, 490). Brown and his wife, Lucille, had returned earlier that evening from a trip to Florida.

Shortly after he heard the shot, Brown heard someone frantically knocking on his front door and shouting, "Possum, open the door. Let me in. They're going to kill me." (Tr. 469-70). Brown immediately called the police (Tr. 494-95). He then opened the front door, and saw a man on his knees on his front porch attempting to repel blows with his arms and hands (Tr. 471). There were four other men on the porch. One man, standing apart from the others, was holding a gun. The other three were huddled around the man who was down, hitting and kicking him. One of these men was beating the victim with an object that was approximately twelve to eighteen inches in length. The man who was down never attempted to hit back (Tr. 474-75).

While the fight was going on, one man said, "Give me that gun." Then another one answered, "No, you almost shot me once and I'm going to keep it this time." (Tr. 473). Then one of the men said, "this is for the way you treated our sister." (Tr. 476). Someone else asked Brown if he had called the Sheriff and Brown replied that he had (Tr. 496). Brown told them that four against one in a fight was not fair, and was advised that he had better get back into the house or they would "give [him] a little of it." (Tr. 476).

The phone rang and Brown went back into the house and answered it. The Sheriff's office had called back to see if the disturbance was still in progress, and Brown assured them that it was (Tr. 477). While he was on the phone his wife went to the bedroom, and through the bedroom window was able to observe the men leaving. Someone said, "put him in the

truck," and another man replied, "no." Then another voice said, "yeah, put him in there." She heard the truck lid slam down and the car left proceeding south toward town (Tr. 498). Neither Brown nor his wife was able to identify any of the men. (Tr. 472, 478, 500).

When the Oklahoma State Bureau of Investigation examined the yard later, Agent Robert Lee found an expended .45 caliber shell in the front yard, and three white buttons near the front porch (Tr. 387). He also took samples of an area on the porch carpet that appeared to be a blood stain (Tr. 386). Subsequent analysis of this carpet sample revealed that the blood stain was caused by a Type A blood, the blood type of Charles Keene (Tr. 438, 450-51, 666).

About two to three hours after the petitioner had left the Thompson house, he returned to that residence and walked into the bedroom where Donetta Bradford

was staying. His nose was bleeding and he was wet from the chest down. (Tr. 686-87). He was not wearing the green toboggan that he had been wearing when he left (Tr. 686, 691).

Donetta Bradford helped the petitioner take off his boots, and the petitioner said, "we killed him. I shot him in the head and cut his throat and threw him in the river" (Tr. 687-88).

Later the petitioner told her that the persons that he had been referring to were Richard Jones, Bobby Glass, Anthony Mann, and himself. He also said that they had taken Stacy Knight home on the way because they were afraid that he might tell on them (Tr. 688).

Early that same morning, Benny McCarthy came to the Thompson house. McCarthy is Charlesetta Garcia's younger brother (Tr. 637). He saw the petitioner crying in his bedroom. When McCarthy asked him what was wrong, the petitioner

would say nothing (Tr. 510-11). McCarthy then went into the kitchen where he heard Anthony Mann and Bobby Glass discuss going back to the river to make sure that the body was not floating, and getting rid of the gun (Tr. 514).

Charlotte Mann, Anthony Mann's former wife, drove to the Thompson residence early that same morning (Tr. 567). She parked her car and walked past the petitioner and his mother on the front porch. The petitioner's mother was trying to calm him down. The petitioner was wet and nervous, and Charlotte Mann heard him say that he had killed him, that Charles Keene was dead, and that Vicky did not have to worry about him anymore (Tr. 568).

The murder weapon, a .45 caliber pistol, was disposed of by Bobby Glass. A comparison of the bullet and bullet fragments taken from the body and the gun revealed that these bullets were

fired from that pistol (Tr. 66, 678; State's Exhibit Nos. 3, 22 and 23). A ballistic examination showed that the .45 caliber cartridge casing found in Malcolm Brown's front yard had been fired from that pistol (Tr. 387-88, 677-78).

During the days following the murder the petitioner made other admissions. A few days afterwards, Charlesetta Garcia saw the petitioner carrying a pair of boots. She noticed hair on the boots, and asked him where the hair came from. He said that that was where he had kicked Charles Keene in the head. He also told her that he had cut Charles's throat and chest, and had shot him in the head (Tr. 634-35).

At some point in time after the murder, but before Charles's body was found, the petitioner and a friend named Gordon had a conversation with Charlotte Mann. Charlotte told the petitioner

that a friend had told her that he had seen Charles dancing at a local bar. The petitioner remarked that that would be hard for Charles to do with a bullet in his head (Tr. 575).

In a separate conversation with Anthony Mann and the petitioner, Charlotte remarked that the body would be found, and that they would be in trouble. They answered by telling her that the body would not be found because a chain and blocks were attached to the body (Tr. 575-76).

On February 18, 1983, Charles Keene's body was recovered from the Washita River (Tr. 649). A concrete block was attached to the body by a log chain, which was wrapped around the victim's legs (Tr. 654; State's Exhibit No. 14). An autopsy of the body revealed that death was caused by gunshot wounds to the head and the chest (Tr. 667). Other injuries to the body included cuts on the

left side of the chest, a seventeen centimeter cut on the neck and throat which was about one-half inch in depth, a broken shin bone in the lower left leg, and multiple abrasions and wounds on the body, particularly on the victim's face and arms (Tr. 661). Keene was alive when all of the wounds were inflicted (Tr. 661-62, 669).

On February 20, 1983, the petitioner and Anthony Mann were arrested in Eufaula, Oklahoma. Officer Bill Day of the Eufaula City Marshall's Office found a knife on the petitioner at the time of his arrest (Tr. 373, 374, 377; State's Exhibit No. 32). Criminalogist Ann Reed was able to determine that blood was on the knife, but she was unable to determine the blood type, or if it was human blood (Tr. 453-54, 460).

At the close of the evidence in the first stage, the jury returned a verdict of guilty for the crime of Murder in the First Degree (Tr. 771-73).

During the second stage of the trial the State called three additional witnesses, Dr. Helen Kline, Oklahoma State Bureau of Investigation Agent Robert Lee, and Lieutenant Ken Reed of the Chickasha Police Department.

Dr. Kline is the clinical psychologist who testified in the petitioner's certification proceeding (Tr. 777). She testified that in her professional opinion the petitioner would, in all probability, commit acts of violence in the future, and that neither imprisonment nor counseling would improve his attitude (Tr. 783).

Agent Robert Lee and Lieutenant Ken Reed testified about the petitioner's reputation for violence in the community, and concerning certain past violent acts committed by him (Tr. 796-97, 800-02).

The defense called Raymond Cloud, Jr., who was a co-worker of the petitioner at a local mobile home factory (Tr.

805). Cloud testified that the petitioner was a good worker, and got along well with his co-workers. He knew of no acts of violence committed by the petitioner (Tr. 806).

The petitioner also called William Broderson, the attorney who represented him in a prior juvenile case, who again testified as to the positive relationship the two had (Tr. 809-10).

The seven-year-old son of the victim was the petitioner's final witness (Tr. 823-33). He testified that the petitioner had never done anything to hurt him (Tr. 832-33).

After hearing the evidence presented during the second stage, the jury determined that the petitioner should receive the death sentence, finding the existence of one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel (Tr. 870).

SUMMARY OF ARGUMENT

I.

In a capital case, the role of the chronological age of a defendant should be confined to that of a mitigating circumstance, and not a complete bar to the execution of a young murderer. Virtually all federal and state courts that have ruled on the issue, have held that the death sentence can be imposed upon a defendant under the age of eighteen. In previous capital cases involving sixteen-year-old defendants, this Court never implied that a state would be precluded from imposing the death penalty.

The complexity of determining the appropriate criminal sanctions for young murderers is another argument against this Court's setting of an arbitrary chronological age regarding the imposition of the death penalty. It is universally recognized that the maturity

level of individual juveniles varies from case to case. Courts have chosen a flexible approach in cases involving the ability of a young person to confess to crimes, to make the abortion decision, and to decide whether to terminate appeals in a capital case. Certification, waiver, and transfer statutes are also evidence of the acknowledgement by most states that individual determinations of criminal responsibility should be made in cases involving young criminals. In capital cases generally, this Court has insisted that individual consideration is to be given to individual defendants.

This Court has also been reluctant to impose rigid rules on state criminal justice systems, and no bright line exists as to what should be the minimum chronological age for imposing the death penalty. The tremendous variance in minimum ages among different states re-

garding the imposition of the death sentence supports that conclusion.

Furthermore, the setting of an arbitrary age, as requested by the petitioner, would violate U.S. Const. art. III principles, since the Court would be deciding future cases involving the imposition of the death sentence upon juveniles without reviewing the facts of each case.

The Supreme Court has consistently refused to create a constitutional definition of criminal responsibility. This is a matter of substantive criminal law that is properly left to the states. In the present case, Oklahoma made a careful finding, by using its certification procedure, that the petitioner should be held accountable for his actions. A state judicial finding that a person is to be held responsible for his actions as an adult should be upheld under the standards of Jackson v. Virginia, 443 U.S. 307 (1979).

The execution of a young murderer serves the same societal purposes as in other capital cases: retribution and deterrence. The facts of certain murder cases involving juveniles show that the moral culpability displayed by those young murderers makes retribution a proper societal response. Also, since there is sufficient evidence to support the belief that young criminals are deterred by appropriate sanctions, the deterrence rationale is properly found. Deterrence is a particularly important objective in view of the significant amount of violent crime that is committed by juveniles in this country.

The execution of young murderers also does not violate proportionality principles of the Eighth Amendment. First, the petitioner in the present case was directly involved in an intentional murder. Second, the objective factors surrounding the execution of juveniles

reveal that legislatures, judicial systems, and juries in this country are not disinclined to impose the death sentence upon juveniles in appropriate cases. Nineteen states permit the execution of a person under the age of sixteen. There are thirty-one persons under the age of eighteen on death rows in fifteen different states in this country. Within the last three years, three seventeen-year-old persons have been executed.

Finally, setting by this Court of a minimum chronological age would prevent subsequent acknowledgement that a different age should be used.

II.

Two photographs entered into evidence during the guilt stage of the trial showed the point of entry of the bullet in the back of the head and the chest. They did not unfairly impassion the jury, nor improperly cause the imposition of the death sentence.

The issue of the photographs is a state evidentiary issue, the admission into evidence of which should not constitute a constitutional violation unless it renders the trial and sentencing so fundamentally unfair as to deny due process. The photographs in the present were corroborative of other testimony, and the trial judge made a specific finding that their probative value outweighed any prejudicial effect.

The aggravating circumstance of especially heinous, atrocious, or cruel was amply supported by the evidence. Therefore, the jury was properly focused on the individual crime, and it cannot be contended that the photographs were the cause of the death sentence in the present case. Furthermore, the fact that the jury refused to find that the petitioner had the propensity to commit criminal acts of violence that would constitute a continuing threat to society

shows that the jury was not acting in a impassioned manner when imposing sentence.

ARGUMENT

PROPOSITION I

THIS COURT SHOULD NOT SET A MINIMUM CHRONOLOGICAL AGE BELOW WHICH A STATE COULD NEVER GO IN IMPOSING THE DEATH PENALTY; SUCH AN INFLEXIBLE STANDARD WOULD BE AN INAPPROPRIATE USE OF THE COURT'S POWER UNDER THE CONSTITUTION SINCE ITS APPROACH SHOULD BE MORE FLEXIBLE REGARDING THE REVIEW OF DEATH SENTENCES IMPOSED BY STATE JUDICIAL SYSTEMS.

A. In a capital case, chronological age should only be a mitigating circumstance, and should not be an absolute bar to the imposition of the death sentence in all cases.

This is the second attempt to have this Court establish, as an aspect of the United States Constitution, a uniform, minimum chronological age for the imposition of the death penalty. See Eddings v. Oklahoma, 455 U.S. 104 (1982). The State of Oklahoma (hereinafter "Oklahoma") submits that while a defendant in a capital case obviously

should be allowed to present chronological age as a mitigating circumstance, the Court should not automatically immunize young murderers of a certain chronological age from the prospect of receiving the death sentence.

This Court, while holding that procedural defects, such as excessively vague sentencing standards, are unconstitutional, "has deferred to the State's choice of substantive factors relevant to penalty determinations." California v. Ramos, 463 U.S. 992, 1001 (1983). Oklahoma contends that as long as the procedural requirement of allowing a murderer to introduce evidence of his or her age as a mitigating factor has been complied with, chronological age should not be used as a substantive bar to the imposition of the death sentence.

In the present case the jury was advised that evidence was offered re-

garding the mitigating circumstance of the existence of youthfulness of the petitioner (J.A. 14). Mitigating circumstances were defined in the instructions (J.A. 23).

Therefore, the jury had the petitioner's age before it, and was not precluded from considering this to be a mitigating circumstance. Cf. Eddings v. Oklahoma, 455 U.S. at 113-14.

Furthermore, the jury was instructed that it must find the existence of one or more aggravating circumstances beyond a reasonable doubt, and that it must unanimously find that any such aggravating circumstances outweighed the finding of one or more mitigating circumstances (J.A. 25). Eddings was complied with, and the Constitution requires nothing more. Eddings, 455 U.S. at 117.

Federal and state courts have been virtually unanimous in rejecting the contention that chronological age alone

bars the imposition of the death penalty. See, e.g., High v. Kemp, 819 F.2d 988, 993 (11th Cir. 1987) (seventeen-year-old); Prejean v. Blackburn, 743 F. 2d 1091, 1098-99 (5th Cir. 1984) (seventeen-year-old); Lynn v. State, 477 So.2d 1365, 1380 (Ala. Crim. App. 1984), rev'd on other grounds sub. nom. Ex parte Lynn, 477 So.2d 1385 (Ala. 1985) (sixteen-year-old); Ward v. State, No. CR-59, slip. op. at 8 (Ark. July 20, 1987) (LEXIS, Ark library, Ark file) (fifteen-year-old); State v. Valencia, 124 Ariz. 139, 602 P.2d 807, 809 (1979) (sixteen-year-old); Thompson v. State, 492 N.E.2d 264, 269 (Ind. 1986) (seventeen-year-old); Ice v. Commonwealth, 667 S.W.2d 671, 680 (Ky. 1984) (fifteen-year-old); Johnson v. State, 303 Md. 487, 495 A.2d 1, 19 (Md. 1985) (seventeen-year-old); Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984) cert. denied, 469 U.S. 1230 (1985), (seventeen-year-old);

Mhoon v. State, 464 So.2d 77, 83 (Miss. 1985); Cannaday v. State, 455 So. 2d 713, 725 (Miss. 1984) (sixteen-year-old); State v. Battle, 661 S.W.2d 487, 494-95 (Mo. 1983) (eighteen-year-old); State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67, 71-72 (1976) (seventeen-year-old).

Furthermore, in two previous cases involving the death penalty being imposed on sixteen-year-olds, this Court never implied that the age of the defendant would be anything more than a mitigating circumstance. Eddings v. Oklahoma, 455 U.S. 104 (1982); Bell v. Ohio, 438 U.S. 637 (1978). Contra Burger v. Kemp, 107 S.Ct. 3114, 3138-41 (1987) (Powell, J., dissenting). In Eddings, the Court, while holding that state courts must consider all mitigating evidence, and weigh it against the evidence of aggravating circumstances, stated, "[w]e do not weigh the evidence for them." 455 U.S. at 117.

Also, in Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987) the Court, citing Eddings and Skipper v. South Carolina, 106 S.Ct. 1669 (1986), noted: "As in those cases, however, the State is not precluded from seeking to impose a death sentence upon petitioner, 'provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available.'" (Emphasis added).

The complexity of determinating the appropriate criminal sanctions for juveniles also weighs heavily against the Court's setting of a fixed line beneath which a state could never go in determining what is the proper age for assessing the death penalty in a particular case. The fact that different young persons have varying levels of maturity was noted by Justice Powell in his dissent in Fare v. Michael C., 442

U.S. 707, 734, n. 4 (1979), where he observed:

> Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'streetwise', hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In re Gault, [citation omitted], the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotion and mental stability, and, of course, any prior record he might have.

The adoption of the "totality of the circumstances" test regarding the admissibility of juvenile confessions by the majority in Fare is in itself a recognition by the Court of the different types of juveniles a system of justice will confront. The majority in Fare stated that this test "refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive

prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation." 442 U.S. at 725-26.

In The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 119-20 (1967) it was noted:

> It is recognized that some youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age level are emotionally and sometimes physically immature individuals . . . .
>
> . . . .
>
> . . . No chronological age bracket is uniformly identical or entirely homogenous.

In Hill, Can the Death Penalty be Imposed on Juvenile: The Unanswered Question in Eddings v. Oklahoma, 20 Crim. L. Bull. 5, 26 (1984) the author stated:

> An arbitrary age limit below which the death penalty should never be imposed would be almost impossible to determine with certainty. Many

> persons who have no objection to executing a youth of sixteen or seventeen would be horrified at the thought of executing a ten-year-old. Further, if the cutoff age were, for example, to be seventeen years, a hardened and sophisticated sixteen-year-old would escape the death penalty while an immature and impulsive seventeen-year-old would not. Chronological age is an inherently poor criterion by which to determine actual maturity.

(Emphasis added) (footnotes omitted).

Even in Twentieth Century Task Force on Sentencing Policy Toward Young Offenders Confronting Youth Crime 5 (1978)[2], a report that opposed the death sentence for young murderers, it was stated that "no single age during mid-adolescence should be used as a sharp dividing line for sentencing policies." See also J. Wilson and R. Herrnstein, Crime and Human Nature 145 (1985) (age as a cause of crime "resists explanation because it is so robust a variable").

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[2] This report was cited in Eddings, 455 U.S. at 115, n. 11.

The petitioner cites Bellotti v. Baird, 443 U.S. 622 (1979), to support his contention that this Court recognizes that minors often lack the experience, perception and judgment with regard to certain choices (Br. of Pet. at 20, 23). Bellotti, however, is more supportive of Oklahoma's position since that case required states to establish a system in which a minor could demonstrate that she was mature and well informed enough to make the abortion decision.

This case, coupled with the holding in Fare v. Michael C., (an uncounseled sixteen-year-old juvenile who requested, but was refused permission to see his probation officer, was found to be capable of confessing to a murder), supports the conclusion that states should be given the freedom to make the determination that some fifteen-year-old persons are mature enough to be held criminally responsible for the crime of intentional

murder, and that the death penalty may be appropriate punishment in a particular case.

In Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985), cert. denied sub. nom. Rumbaugh v. McCotter, 473 U.S. 919 (1985), the court held that a seventeen-year-old person, despite mental illness marked by depression, did not lack the requisite mental competence to waive his right to further judicial review of his conviction and sentence.[3]

If a young person can be found to be able to voluntarily confess to a murder, to make a decision about whether to have an abortion, or to choose to stop further appeals of his death sentence and be executed, certainly a state judicial system should be able to find that cer-

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[3] The petitioner is that case, Charles Rumbaugh, was executed on September 11, 1985. NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 4 (May 1, 1987).

tain juveniles should be held accountable for their actions and, in appropriate cases receive the death sentence, for the act of killing another human being.

The existence of certification, waiver, and transfer statutes in various states is itself a recognition of the desirability of making individual determinations concerning criminal responsibility in cases involving young offenders. This Court has noted that "an overwhelming majority of jurisdictions permit transfer in certain instances." Breed v. Jones, 421 U.S. 519, 535 (1975). The Federal Juvenile Delinquency Act, 18 U.S.C. § 5031 et.seq. also contains a transfer provision for fifteen-year-old offenders. 18 U.S.C. § 5032.[4] Certification statutes recognize that the

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[4] The age for transfer under this Act was lowered from sixteen to fifteen years of age in 1984.

chronological age of an offender is an artificial and arbitrary line to draw in assessing responsibility for criminal behavior.

The facts of various death cases involving young murders also demonstrate the inappropriateness of setting a minimum chronological age regarding the death penalty.

James Terry Roach, the petitioner in Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985), cert. denied sub. nom. Roach v. Aiken, 106 S.Ct. 645 (1986)[5] was seventeen years old at the time he murdered the two people in his case. The State's chief forensic psychiatrist testified that Roach was mentally retarded, and it was contended he had Huntington's disease. 757 F.2d at 1473-76; 106 S.Ct. at 646-47 (Marshall, J., dissenting).

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[5] Roach was executed on January 10, 1986. NAACP Legal Defense and Educational Fund, Inc., Death Row, U.S.A. 4 (May 1, 1987).

Christopher Burger was seventeen years old at the time of the murder in his case. A psychologist testified that "he had an I.Q. of 82 and functioned at the level of a 12-year old child." Burger v. Kemp, 107 S.Ct. 3114, 3118 (1987).

Monte Lee Eddings was sixteen years, four months old at the time of the murder in his case.[6]

William Wayne Thompson, the petitioner in the present case, was fifteen years, ten and one-half months old, at the time of the murder in his case (R. 479).[7]

It is apparent from a comparison of these four cases that the chronological age of the four should not be the sole

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[6] Brief for Petitioner at 60, n. 129, Eddings v. Oklahoma, 455 U.S. 104 (1982) (No. 80-5727).

[7] A psychological evaluation performed August 25, 1982, revealed that the petitioner's I.Q. was 85. (C.Tr. 88-89, Exhibit 3).

basis for deciding whether each young murderer should have received the death sentence. Significantly, Roach, the only one of the four to be executed, had mental problems that seemed to be more severe than those of the other three.

Finally, the petitioner in the present case appears to have committed the more premeditated crime of the four.[8] Also, the motive for the petitioner's actions is clearer than in the other cases, retribution for the mistreatment of the petitioner's sister by the victim (Tr. 568).[9]

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[8] The petitioner told Donetta Bradford before he left his house, "we're going to kill Charles." (Tr. 685).

[9] In Solem v. Helm, 463 U.S. 277, 293-94 (1983) the Court stated that a court is entitled to look at a defendant's motive in committing a crime. Also, the fact that the petitioner's victim was a repugnant person should have no bearing on the appropriateness of the death penalty. Cf. Booth v. Maryland, 107 S.Ct. 2529, 2534 n. 8 (1987). The jury in the present case was fully advised about the victim's previous behavior.

The age of a murderer, therefore, is but one of many factors that are to be considered when assessing the death sentence. It should not be the only one.

There is no better statement of what role the age of a defendant should be in a sentencing decision than that made by the court in Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984), cert. denied, 469 U.S. 1230 (1985), where it was stated:

> We do not hold that the death penalty is constitutionally permissible as applied to all juveniles, nor do we hold that any particular chronological age serves as a bright line under which the death penalty may not be imposed. We simply hold that on the facts of this case, Trimble's age - 17 years and 8 months - does not engage the Eighth Amendment as a shield to capital punishment. We believe that such a case-by-case approach not only affords the accused the individualized consideration warranted in death-penalty cases, but it also avoids the arbitrary line-drawing that is endemic to any hard-and-fast distinction between juveniles and non-juveniles.

Furthermore, in capital cases the Court has stressed the necessity for individualized consideration of defendants. Lockett v. Ohio, 438 U.S. 586, 602-05 (1978). See also Booth v. Maryland, 107 S.Ct. 2529, 2532 (1987) ["a jury must make an 'individualized determination of whether the defendant in question should be executed, ...'" (emphasis original)].

This Court has been reluctant to impose inflexible rules on the states' criminal justice procedures. See Barker v. Wingo, 407 U.S. 514, 522-25 (1972) (the Court refuses to set a specific time period within which a defendant must be tried pursuant to speedy trial principles of the Sixth Amendment).

With regard to Eighth Amendment judgments, this Court has refused to become engaged in "the basic line-drawing process that is preeminently the province of the legislature . . . ." Rummel v. Estelle, 445 U.S. at 275.

In Rummel, Justice Rehnquist set forth the reasons why the Court was able to draw the line in Coker v. Georgia, 433 U.S. 584 (1977), stating:

> Since Coker involved the imposition of capital punishment for the rape of an adult female, this Court could draw a 'bright line' between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction. For the reasons stated by Mr. Justice Stewart in Furman, see supra, at 272, this line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years.

445 U.S. at 275.

Therefore, with regard to the death sentence being imposed on young murderers, chronological age is a poor "bright line" to use, particularly since there is no uniform standard in state judicial systems. See cases cited supra, pp. 36-37. There also is considerable disagreement among state legislatures as to what the minimum age for imposing the death sentence should be. See Br. of Pet., App.

B. Cf. Solem v. Helm, 463 U.S. at 294-95. This further demonstrates that no bright line exists regarding this issue, and that chronological age should not be the basis of this decision.

Some persons (and states) believe that the age sixteen should be the bright line as to the issue in question. The petitioner argues in his brief that the age of fifteen is too young for the imposition of the death penalty. If the petitioner waited another month and one half before he murdered Charles Keene, he would have been sixteen years of age. The difference of forty-five days between these two ages should not be the basis of constitutional line drawing.

The petitioner himself has not stated what chronological age the United States Constitution sets as the minimum for the imposition for the death sentence, merely requesting the Court to set a "specified" age (Br. of Pet., at 46-49).

The fact that the petitioner cannot say what the "bright line" is in this regard is further proof of its non-existence.

Finally, for the Court to set an arbitrary age that would apply to all future cases would violate U.S. Const. art. III, which requires that there be a case or controversy before the federal judicial power can be invoked. See J. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U.L. Rev. 100 (1985). For the Court to decide, in advance, all capital cases involving juveniles below a certain age would be contrary to the proper function of this Court.

> B. The Supreme Court has consistently refused to formulate a constitutional definition of responsibility; that decision should be left to the states, and should be upheld as long as there is sufficient evidence to support that finding.

Another argument against this Court's setting of an inflexible chronological age of criminal responsibility

pertaining to the death penalty, is that the Court has consistently refused to formulate a constitutional definition of criminal responsibility, preferring to leave such a matter to the states.

In Leland v. Oregon, 343 U.S. 790 (1952), the Court refused to invalidate an Oregon law that placed the burden upon the defendant to prove his insanity at the time of the commission of the crime beyond a reasonable doubt, despite the fact that Oregon was the only state placing such a burden on a defendant. The continuing validity of Leland has been reaffirmed in recent years. Patterson v. New York, 432 U.S. 197, 205 (1977); Rivera v. Delaware, 429 U.S. 877 (1976).

The Court in Leland refused to impose a constitutional test of legal insanity upon the states. It held that the "choice of a test of legal sanity involves not only scientific knowledge

but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." 343 U.S. at 801. The Court declined to require Oregon to adopt the "irresistible impulse" test of insanity.

In Powell v. Texas, 392 U.S. 514 (1968), the Court refused to extend its holding in Robinson v. Califoria, 370 U.S. 660 (1962), stating that "chronic alcoholism" was not a constitutional defense to a criminal charge of public intoxication. It noted that it had never "articulated a general constitutional doctrine of mens rea," 392 U.S. at 535. The Court in Powell refused to embark upon the course of articulating "a constitutional doctrine of criminal responsibility." 392 U.S. at 534.

In Gregg v. Georgia, 428 U.S. 153, 176 (1976) the Court quoted from Powell, noting that "[c]aution is necessary lest this Court become, "under the aegis of

the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'"

The same concerns expressed in Gregg and Powell were voiced again in Lockett v. Ohio, 438 U.S. 586 (1978), by Justice Blackmun, concurring, who observed what requiring a state to show an "actual intent to kill", before imposing the death penalty, would mean. He stated:

> The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate 'constitutionalized' definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

438 U.S. at 615, n. 2.

If the Court sets a minimum chronological age regarding the imposition of the death sentence, there is no doubt that defendants who are older chronologically would contend that mental or emotional deficiencies place them in the same constitutional category as the fifteen, sixteen, and seventeen-year-old murderers who would be immunized by this Court's decision. Therefore, the Court inevitably would be forced to create a constitutional definition of minimum criminal responsibility. Furthermore, the Court would have to decide whether a different standard applies in capital and non-capital cases.

This Court is the ultimate authority for deciding what degree of intent, if any, is required in a federal prosecution. The holdings in United States v. United States Gypsum, 438 U.S. 422 (1978); United States v. Freed, 401 U.S. 601 (1971); and Morissette v. United

States, 342 U.S. 246 (1952), all reflect the Court's involvement in the determination of the requisite degree of intent in federal cases. Apart from limited intervention in cases involving blatant injustice,[10] however, the Court has considered the mental state of the offender to be the province of state courts, juries, and legislatures.[11]

The petitioner in the present case was convicted under that portion of Oklahoma's first degree murder statute that

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[10] See Lambert v. California, 355 U.S. 225 (1957), where the Court held that a person should not be convicted of violating a city ordinance requiring registration of felons where there was no showing of the probability of knowledge of such an ordinance.

[11] Obviously, the state must refrain from shifting the burden of proof to the petitioner, and thus interfering with the constitutional requirement that the state prove every element of a criminal offense beyond a reasonable doubt, e.g., Sandstrom v. Montana, 442 U.S. 510 (1979), and Mullaney v. Wilbur, 421 U.S. 684 (1975). Also, there must be sufficient evidence to support a finding of the requisite intent. Jackson v. Virginia, 443 U.S. 307 (1979).

requires that he act with "malice aforethought" in causing the death of another. Okla. Stat. Ann. tit. 21 § 701.7 (West 1983). The facts of the present case support the jury's finding that the petitioner acted with "malice aforethought" or possessed "a purpose to cause the death of the victim." See Lockett v. Ohio, 438 U.S. at 624 (White, J., concurring).

Furthermore, Oklahoma made a careful and thorough determination, by the use of its certification procedures, that the petitioner was accountable for his intentional act of murder. See supra, pp. 4-12.

Under the Oklahoma law, the certification hearing judge is required to consider six guidelines in determining whether a juvenile should be certified to stand trial as an adult. The State must prove by substantial evidence that the offender is not amenable to treatment in the juvenile system. In re E.O.,

703 P.2d 192, 193 (Okla. Crim. App. 1985); K.C.H. v. State, 674 P.2d 551, 552 (Okla. Crim. App. 1984).

The court is required to make a determination as to "[t]he sophistication and maturity of the juvenile, including his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living." Okla. Stat. Ann. tit. 10, § 1112(b)(3) (West Supp. 1987).

The court is also required to state, in writing, its reasons for certifying the person to stand trial as an adult, and "shall certify that such child shall be held accountable for its acts as if he were an adult . . . . " Okla. Stat. Ann. tit. 10, § 1112(b)(6) (West Supp. 1987).

The evidence presented in the present case was more than sufficient to

support the certification court's decision that the petitioner was accountable for his actions and that he acted with "malice aforethought."

The rule of adult criminal responsibility in Oklahoma is set forth in Hair v. State, 532 P.2d 72, 76 (Okla. Crim. App. 1975), which noted that the "well settled" test of criminal responsibility for committing an act which is declared to be a crime is fixed at the point where the defendant "has mental capacity to distinguish between right and wrong, as applies to a particular act, and to understand the nature and consequences of such an act." See also Jones v. State, 648 P.2d 1251, 1254 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1155 (1983).

In Jackson v. Virginia, 443 U.S. 307 (1979), the Court held that in federal habeas corpus proceedings, federal courts are required to review a

state court conviction to determine whether, when viewed in the light most favorable to the prosecution, a rational factfinder could have found the defendant guilty beyond a reasonable doubt under the applicable state law.

The defendant in Jackson was convicted of first degree murder under Virginia state law. The factual issue in Jackson was whether there was sufficient evidence to support a finding that the defendnat had specifically intended to kill the victim. This Court held that "[t]his question . . . must be gauged in the light of applicable Virginia law defining the element of premeditation." 443 U.S. at 324. The Court pointedly rejected the suggestion that the standard set forth would invite intrusions upon the power of the states to define criminal offenses and stated:

> Quite to the contrary, the standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.

443 U.S. at 324, n. 16. See also Moore v. Duckworth, 443 U.S. 713 (1979), where the Court held that Indiana state law would govern a determination whether the evidence of sanity was sufficient under the Jackson v. Virginia standard.

The record in this case fully supports Oklahoma's findings that the petitioner was accountable for his acts as an adult. The deference that this Court has paid to state decisions regarding the substantive criminal law subject of intent and insanity should apply to a state finding of "accountability," which, if anything, is a more sophisticated decision than that regarding intent.

While intent involves an accused's mental state at the time of the commission of the crime, the "accountability" of a person with regard to his actions may involve the weighing of such matters as his physical development, prior

criminal record, and family environment. Indeed, the six statutory guidelines that the juvenile judge found in the present case demonstrate the complexity of the decision (J.A. 5-8).

At common law those persons who reached the age of fourteen were treated as fully responsible for their acts. W. LaFave and A. Scott, Criminal Law, § 4.11 at 398 (2d ed. 1986). The common law rule has been adopted by statute in Oklahoma. Okla. Stat. Ann. tit. 21 § 152 (West 1983). See also Standards Relating to Juvenile Delinquency and Sanctions, § 15, at 32 (1980) (juvenile delinquency liability should not be imposed if at the time of the conduct charged, as a result of mental disease or defect, the juvenile lacked substantial capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law). The level of criminal responsibility dis-

played by the petitioner in the present case falls within the definitions of such that have previously been set forth.

Oklahoma urges this Court to adopt the Jackson v. Virginia standard for reviewing its finding of "accountability" or "criminal responsibility." The Court should hold that a finding under state law that any person is accountable or criminally responsible for his actions should be upheld absent a finding that, under applicable state law and upon review of the record in the light most favorable to the prosecution, a rational factfinder could not have found the petitioner guilty beyond a reasonable doubt. The determination of criminal responsibility should continue to be left to the states.

If a person is insane at the time of the crime, it is probably cruel and unusual punishment to execute that person for acts committed while he was in that

condition. Cf. Ford v. Wainwright, 106 S.Ct. 2595, 2602 (1986). No one can contend, however, that the petitioner in this case was unable to understand the nature of his actions and the consequences that would result therefrom.

C. The execution of a young murderer is appropriate under the same rationale as that found by this Court in Gregg v. Georgia.

In Gregg v. Georgia, 428 U.S. 153, 183-87 (1976) the Court held that the death sentence is supported by two rationale: retribution and deterrence. Oklahoma contends that these two justifications are just as valid when the murderer is a young person.

1. Retribution.

Regarding the retributive aspect of the imposition of the death penalty upon a young murderer, it cannot be denied that in this country this class of criminals are capable of committing horrifying crimes. The facts of a number of

cases reveal that young murderers are capable of acts of incredible viciousness and cruelty. See e.g., Burger v. Kemp, 107 S.Ct. 3114, 3117-18 (1987); High v. Kemp, 819 F.2d 988, 990 (11th Cir. 1987); Roach v. Martin, 757 F.2d 1463, 1467-68 (4th Cir. 1985), cert. denied sub. nom. Roach v. Aiken, 106 S.Ct. 645 (1986); Stanford v. Commonwealth, ___ S.W.2d _____ (Ky. 1987);[12] Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980), 428 So.2d 649 (Fla. 1983), cert. denied, 464 U.S. 865 (1983); Ice v. Commonwealth, 667 S.W. 2d 671, 672-73 (Ky. 1984), cert. denied, 469 U.S. 860; State v. Rushing, 464 S.2d 268 (La. 1985), cert. denied, 106 S.Ct. 2258 (1986); Johnson v. State, 303 Md. 487, 495 A.2d 1, 7-8 (1985), cert. denied, 106 S.Ct. 868 (1986); Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984),

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12 The seventeen-year-old defendant in this case is the co-defendant of the petitioner in Buchanan v. Kentucky, 107 S.Ct. 2906 (1987).

cert. denied, 469 U.S. 1230 (1985); Tokman v. State, 435 S.2d 664, 666-67 (Miss. 1983), cert. denied, 467 U.S. 1256 (1984); State v. Lashley, 667 S.W. 2d 712, 713-14 (Mo. 1984), cert. denied, 469 U.S. 873; Cannon v. State, 691 S.W. 2d 664, 667-69 (Tex. Crim. App. 1985), cert. denied, 106 S.Ct. 897 (1986); Garrett v. State, 682 S.W.2d 301 (Tex. Crim. App. 1984), cert. denied 471 U.S. 1009 (1985); Pinkerton v. State, 660 S.W. 2d 58, 59-61 (Tex. Crim. App. 1983).

One who reads the facts of these cases cannot think but that state judicial systems are justified in believing that these crimes "are themselves so grievious an affront to humanity that the only adequate response may be the penalty of death." Gregg, 428 U.S. at 184.

Obviously, there is little, if any, retributive value in "executing a person who has no comprehension of why he has been singled out and stripped of his

fundamental right to life." Ford v. Wainwright, 106 S.Ct. 2595, 2602 (1986). In the present case, however, the petitioner fully comprehended what he was doing and later expressed pride in what he had done (Tr. 568, 575, 576, 647, 684, 685, 687).

This Court has also noted that the retributive aspect of the death sentence "'is less strong with respect to a defendant who played a minor role in the murder for which he was convicted.'" Sumner v. Shuman, 107 S.Ct. 2716, 2727 (1987). See also Solem v. Helm, 463 U.S. 277, 296 (1983) (the Court, in applying proportionality principles, observed that the crime in that case involved a "passive" felony).

In Tison v. Arizona, 107 S.Ct. 1676, 1683 (1987) the Court held that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culp-

ability of the criminal offender." The Court also noted that "[a] critical facet of the individual determination of culpability required in capital cases is the mental state with which the defendant commits the crime" and that "the more purposeful is the criminal conduct, the more serious is the offense . . . " Id. at 1687. See also Sumner v. Shuman, 107 S.Ct. at 2724 ("the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime."); and Booth v. Maryland, 107 S. Ct. 2529, 2533, (1987) (factors regarding the death sentence "must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.'")

In Enmund v. Florida, 458 U.S. 782, 800 (1982) the Court observed:

> As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability

> - what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention - and therefore his moral guilt - to be critical to "the degree of [his] criminal culpability," Mullaney v. Wilbur, 421 U.S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrong-doing.

See also Skipper v. South Carolina, 106 S.Ct. 1669, 1675 (1986) ("Society's legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder. . . .").

In the present case the facts reveal the petitioner's direct, personal involvement in the murder of the victim. Therefore, under the principles of retribution set forth above, his "personal culpability" certainly justifies the retributive aspect of the death sentence.

2. Deterrence.

As to the deterrence aspect, in Gregg, the Court noted that the murders

most likely to be deterred are those "carefully contemplated murders, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act" (footnote omitted). 428 U.S. at 186. As noted previously, there is no question that the petitioner's acts were calculated.

There is no reason to think that the deterrent aspect of the death sentence would not deter some would-be young murderers. As the court stated in Trimble v. State, 300 Md. 387, 478 A.2d 1143, 1164 (1984) cert. denied, 469 U.S. 1230 (1985):

> This is not a case like Enmund where the deterrent function of the criminal law could not operate because the defendant did not intend to kill the victim. Trimble's culpability level was unaffected by his age, which was only four months from the age of majority. Imposition of the death penalty in this instance will send a message to others contemplating similar acts that society will respond harshly to their actions. In short, we believe that seventeen-year-old youths can be deterred from committing brutal rape-murders, so the legislature's judgment in that regard is not a purposeless act.

In B. Boland and J. Wilson, Age, Crime and Punishment, 51 Pub. Interest 22, 26 (1978), the authors noted that "young males commit more crimes than older males," and disagreed with the concept of imposing the most severe punishment on older criminals, since they are nearing the end of their criminal careers.[13] The authors observed that "sanctions do affect crime rates, other things being equal." Id. at 33.

Other experts and studies have concluded that sanctions are a deterrent to juvenile crime. See R. Fine, Escape of the Guilty 160-74 (1986); N.Y.Times, Mar. 5, 1982, at B1, col. 2.

Therefore, Oklahoma contends that it is appropriate for legislatures and courts to be permitted to impose the ultimate punishment on juveniles, if

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[13] In J. Wilson and R. Herrnstein, Crime and Human Nature 143 (1985) the authors note that "[i]n general the tendency to break the law declines throughout life."

those entities believe that it may deter violent juvenile crime, which constitutes a significant and growing portion of violent crime in America.[14]

In this age of television, it cannot be said that young persons will not be made aware of the potential consequences of intentional murder. Furthermore, young murderers can be expected to commit crimes in such a way that will facilitate their escape, and the possible murder of witnesses is one of the primary justifications for the death sentence. See High v. Kemp, 623 F.Supp. 316, 317 (S.D. Ga. 1985), aff'd. 819 F.2d 988

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[14] See B.Boland and J. Wilson, Age, Crime, and Punishment, supra at 22 ("It is well known that young males commit a disproportionately large share of many serious crimes."). The F.B.I. Uniform Crime Reports 190 (1979), reveal that during the period from 1970-1979, violent crime arrests of persons under the age of eighteen rose 41.3%. In the most recent report, F.B.I. Uniform Crime Reports 12 (1986), it is noted that murder arrests for persons under the age of eighteen increased 9% in the year 1985-86. The same report reveals that 30% of the Crime Index offenses are committed by persons under the age of eighteen. Id. at 163.

(11th Cir. 1987) (seventeen-year-old and his two accomplices planned an armed robbery with the express purpose of eliminating any witnesses); and Mhoon v. State, 464 So.2d 77, 79 (Miss. 1985) (eighteen-year-old advised his sixteen-year-old accomplice to the murder that "[t]he best witness is a dead witness").

In Gregg v. Georgia, 428 U.S. at 186, the Court noted that

> "[t]he value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

For the reasons stated, Oklahoma contends that the deterrence rationale is appropriate in the present case.

> D. The imposition of the death penalty in the present case does not violate the proportionality principles of the Eighth Amendment and is supported by objective factors.

Oklahoma also contends that Eighth Amendment proportionality principles do

not prohibit the imposition of the death penalty upon a young murderer who is aware of what he is doing.

This Court has rarely invoked the principle of disproportionality to strike down sentences. One writer has noted that Coker v. Georgia, 433 U.S. 584 (1977) marked the first time since Weems v. United States, 217 U.S. 349 (1910) that the Supreme Court has relied upon disproportionality principles to invalidate a punishment under the Cruel and Unusual Punishment Clause. Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U.Pa.L.Rev. 989, 990 (1978). But see Solem v. Helm, 463 U.S. 277 (1983) (sentence was disproportionate where sentence was life without possibility of parole, and the defendant had engaged only in minor criminal conduct) and Edmund v. Florida, 458 U.S. 782 (1982).

In Solem, the Court noted that "[i]n view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." 463 U.S. at 290, n. 16. The Court also stated that objective criteria involved the gravity of the offense, which included the magnitude of the crime and the culpability of the offender. Id. at 292.

The crime committed by petitioner involved the intentional taking of another human life. While it is correct to say that the penalty of death is unique as a punishment, Furman v. Georgia, 408 U.S. at 306 (Stewart, J., concurring), murder is incomparable as a crime. In Coker v. Georgia, 433 U.S. at 598, the Court observed that, despite the reprehensible nature of the crime

of rape, "it does not compare with murder."

Furthermore, the murder in the present case was an intentional killing where the petitioner was a direct participant.[15] This is not a situation where the petitioner was merely an accomplice during felony murder. Cf. Tison v. Arizona, 107 S.Ct. 1676 (1987); and Enmund v. Florida, 458 U.S. 782 (1982).

In Coker v. Georgia, 433 U.S. 584, 592 (1977), Justice White stated:

> [T]hese Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence - history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted . . . .

A review of the objective factors regarding the execution of persons fif-

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[15] The petitioner advised friends that he both cut the victim's throat and shot him (Tr. 634-35, 687-88).

teen years of age at the time of the commission of the crime supports Oklahoma's statutory scheme allowing such executions. First, this Court has viewed the actions of the various state legislatures as the most important index of contemporary society's view of a particular punishment. In Gregg v. Georgia, 428 U.S. at 179, the Court stated that the legislative response to Furman v. Georgia, 408 U.S. 238 (1972), was "[t]he most marked indication of society's endorsement of the death penalty . . . ."

In this country nineteen states permit the execution of a person who is under the age of sixteen at the time of the murder.[16] This obviously represents

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[16] Br. of Pet., App. B. at 2b-3b. Although the petitioner's brief lists twenty states that fall within that category, it appears that Kentucky's minimum age for execution is now sixteen. Ky. Rev. Stat. Ann. § 640.040(1) (Supp. 1987). There seems to be no conclusive trend toward either the raising or lowering of the minimum age. In 1981, Idaho lowered the age of criminal responsibility, and therefore lowered the minimum age at which a person could receive the death sentence. Idaho Code

a high percentage of the thirty-five states that presently have death penalty statutes.

In Coker v. Georgia, 433 U.S. at 595-96, Court relied heavily on the fact that "Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman. . . ." See also Rummel v. Estelle, 445 U.S. 263, 280, n. 22 (1980).

Furthermore, at the present time there are thirty-one persons on death row for crimes committed while under the

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16 (continued) § 16-1806A(1) (Supp. 1987). Montana also lowered its minimum age for both criminal responsibility and the death sentence in 1985 from ten years to sixteen years. Mont. Code Ann. § 41-5-206(1)(a) (Supp. 1987). In 1987, Indiana raised its minimum age for the death sentence from ten years to sixteen years. Ind. Code Ann. § 31-6-2-4 (signed by Governor on April 6, 1987).

age of eighteen.[17] Therefore, it is obvious that American juries are not disinclined to impose the death penalty upon young murderers in appropriate cases. This is particularly true because those convicted murderers have been sentenced by juries in fifteen different states.

While the number of persons sentenced to death in this age category is not extremely large, it is indicative of the fact that the imposition of death under these circumstances is not unknown. In Coker v. Georgia, 433 U.S. at 597, the Court stated that the fact that Georgia juries had sentenced six rapists to

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[17] Br. of Pet., App. F. The petitioner's brief lists thirty-two such persons, but recently in Ward v. State, No. CR 86-59, slip op. (Ark July 20, 1987) (LEXIS, Ark library, Ark file) the Arkansas Supreme Court reversed the conviction and death sentence of Donald Ward, who was fifteen years old at the time of the crime. The court, however, held that the imposition of the death sentence upon a person that age was not unconstitutional. Id. at 8.

death since 1973 was "not a negligible number; . . . . "

Furthermore, Oklahoma contends that the addition of more juveniles to death rows in America would be an inappropriate basis for upholding the imposing of the death sentence upon some young murderers. The fact that state judicial systems have not sent every juvenile murderer to death row should not be held against them, and they should continue to have considerable latitude in selecting the appropriate recipients of the death penalty.

Also, the fact that two federal circuit courts of appeal, and supreme courts in a number of states have upheld death penalties for young murderers shows that state judiciaries are not offended by the imposition of the death sentence upon this class of murderer. See cases cited supra, pp. 36-37.

Additionally, in the past two years, two different states have executed persons who were seventeen years

old at the time of the commission of the crime. [18] This is further proof that the public is not offended by the executions of young murderers, particulary since there has been no evidence of a public outcry against these executions, and neither state changed its law after such.

In Hill, Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in Eddings v. Oklahoma, 20 Crim. L. Bull. 5, 23 (1984), the author observed that

> the views of society regarding capital punishment for juveniles do not rise to the level of widespread or general rejection. At this time, societal attitudes are too vague and unclear to rise to constitutionally significant dimensions.

(footnote omitted).

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[18] Charles Rumbaugh in Texas on September 11, 1985; James Terry Roach in South Carolina on January 10, 1985; and Jay Pinkerton in Texas on May 15, 1986. NAACP Legal Defense and Educational Fund, Inc., Death Row U.S.A. 4 (May 1, 1987).

Finally, although the question of how frequently capital punishment of juveniles has been imposed is subject to debate, there is precedent under both American and English law for executing young murders. Compare Note, Capital Punishment for Minors: An Eighth Amendment Analysis, 74 J. Crim. L. and Criminology, 1471, 1475 (1983) and Hill, Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in Eddings v. Oklahoma, 20 Crim. L. Bull. 5, 9-10 (1984) with Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Clev.St.L.Rev. 363, 376 (1986). See also 4 W. Blackstone, Commentaries *23-24.

Against the common law precedent, the array of states that have set fifteen or below as the age of ultimate criminal responsibility, and the absence of a "bright line" with which to guide this Court as in Coker v. Georgia, the petitioner bases his argument essentially

upon humanitarian principles. As the legal foundation for his position, the petitioner sets forth authority such as statutes relating to marriage and contract laws, international treaties, and the death penalty laws of other countries.

Oklahoma contends, however, that its power as a state to determine the appropriate age of criminal responsiblity for such an act as committed by the petitioner should not be limited by such authority and that previous decisions of this Court interpreting the Eighth Amendment allow Oklahoma such a legislative and judicial judgment.

In Patterson v. New York, 432 U.S. 197, 201 (1977), the Court noted:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, Irvine v. California, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.

With regard to the recitation of the treaties referred to, and the laws of other countries regarding the death penalty, Oklahoma can find no better response than the statement of Justice Harlan in McGautha v. California, 402 U.S. 183, 221 (1971) (quoted in Lockett v. Ohio, 438 U.S. 586, 632-33 [1978], Rehnquist, J., concurring in part and dissenting in part), who noted:

> It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court.

Furthermore, regarding the humanistic basis for arguing that the death sentence should not be imposed upon any

young murderer regardless of how savage the crime, Oklahoma contends that a state should be able to decide that it is more in danger of being engulfed by barbarism by not adequately responding to horrible murders, than it would be by executing juvenile murderers in appropriate cases.

The petitioner has relied heavily on sociological studies in his brief in requesting the Court to impose a fixed, chronological age of criminal responsibility upon half of the states that have the death penalty. This Court, however, has apparently moved away from the heavy reliance on sociological sources such as were used in In re Gault, 387 U.S. 1 (1967). See Streib, From Gault to Fare and Smith: The Decline in Supreme Court Reliance on Delinquency Theory, 7 Pepperdine L. Rev. 801 (1980). The de-emphasis on sociological studies in determining constitutional principles

is consistent with the concept that Eighth Amendment judgments "should be informed by objective factors to the maximum possible extent." Coker v. Georgia, 433 U.S. at 592. Reliance on sociological data is an invitation to invoke one's subjective viewpoint, since sociological studies can support any number of perspectives.[19] In Rummel v.

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[19] The petitioner urges that the prospects for rehabilitation must be considered before a sentencer can impose the death sentence upon a young murderer. (Br. of Pet. 37). Recent studies show, however, that rehabilitative efforts in the juvenile area have had tremendous failures. N.Y. Times, Mar. 5, 1982, B.4, col. 1-3; Law Enforcement Assistance Administration, U.S. Dept. of Justice, Reports of the National Juvenile Justice Assessment Centers, Juvenile Delinquency Prevention Experiments: Review and Analysis (1980); R. Fine, Escape of the Guilty, 164-65 (1986). Indeed, studies note that the results of the Cambridge-Somerville Youth Project showed that the study group which received years of intensive counseling fared worse than the study group that received no special attention. Law Enforcement Assistance Administration, U.S. Dept. of Justice, supra, at 24.

Other studies have shown that chronic juvenile offenders, a group within which the petitioner in the present case seems to fall, not only commit most of the crimes committed by

Estelle, 445 U.S. 283-84, the Court noted that the fact that penologists themselves have disagreements with regard to sentencing policy reinforced the Court's conviction that any "'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts."

This Court has repeatedly recognized that "we may not act as judges as we might as legislators," Gregg v. Georgia, 428 U.S. at 175 (Stewart, J., plurality opinion), and that the Constitution has not given this Court a "roving commission" to impose upon the states its own notion of enlightened policy. Rummel v. Estelle, 445 U.S. at 285 (Stewart, J., concurring). Reviewing courts "should

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19 (continued) juveniles, but generally continue to commit crimes as adults. Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Delinquency in Two Birth Cohorts: Executive Summary at iii, 24 (1985).

grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments as well as to the discretion that trial courts possess in sentencing convicted criminals." Solem v. Helm, 463 U.S. at 290.

The setting by this Court of an arbitrary, minimum chronological age for which a person could receive the death penalty would foreclose the possibility of later recognition that the age should be set at a lower point.[20] If the Supreme Court makes that determination, "[r]evisions cannot be made in the light of further experience." Gregg v. Georgia, 428 U.S. at 176.

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[20] In 1971, the Senate Joint Resolution that was passed in support of U.S. Const. amend. XXVI (which lowered the voting age to eighteen), noted that "Dr. Margaret Mead and others have shown that the age of physical maturity of American youth has dropped more than three years since the eighteenth century." S.J. Res. 7, 92d. Cong., 1st Sess. (1971), reprinted in 1971 U.S. Code Cong. & Admin. News, 931, 935.

PROPOSITION II

THE ADMISSION INTO EVIDENCE OF COLOR PHOTOGRAPHS OF THE VICTIM, WHICH SHOWED THE POINTS OF ENTRY OF THE TWO BULLETS, DID NOT RENDER THE TRIAL OR SENTENCING OF THE PETITIONER SO FUNDAMENTALLY UNFAIR AS TO DENY DUE PROCESS.

The petitioner contends that his constitutional rights were violated by the admission into evidence of two color photographs, which were admitted into evidence during the guilt stage of the trial (Tr. 626-28). Oklahoma contends that this is a state evidentiary question, and there is no showing that the admission of the evidence has rendered the trial so fundamentally unfair as to deny due process.

Perusal of these two photographs, which were State's Exhibits Nos. 10 and 11, reveal their probative value. These photographs show that the victim was shot in the back of the head and the chest, and therefore are corroborative

of other trial testimony concerning the cause of death (Tr. 655-56, 666-67). Furthermore, the trial judge made a specific finding that their probative value outweighed any prejudicial effect (Tr. 627-28).

In Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974), the Court stated that not every trial error or infirmity which might call for the application of supervisory power constitutes a failure to observe fundamental fairness essential to the very concept of due process, citing Lisenba v. California, 314 U.S. 219, 236 (1941). The Court in Donnelly noted that when specific guarantees of the Bill of Rights are involved, the Supreme Court has taken special care to insure that prosecutorial conduct in no way impermissibly infringes upon them. Id. at 643. The Court stated, however, regarding an alleged trial error, that constitutional error would not be found

unless the error so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id.

The Court recently held in two state criminal cases that the alleged trial errors did not meet this requirement. Darden v. Wainwright, 106 S.Ct. 2464 (1986) (prosecutors closing arguments were not fundamentally unfair); and Holbrook v. Flynn, 106 S.Ct. 1340 (1986) (security force present in courtroom was not prejudicial).

This Court has never ruled on the admissibility of allegedly gruesome photographs in a criminal trial. Cf. Lisenba v. California, 314 U.S. at 227-29 (the Court rejects contention that bringing two rattlesnakes in the courtroom prejudiced the defendant's rights). The United States Court of Appeals for the Fifth Circuit, however has reviewed a due process claim involving photographic evidence. In Mercado v. Massey, 536

F.2d 107, 108 (5th Cir. 1976), the court rejected the petitioner's claim that the photographs of the deceased's body so inflamed the jury as to deny him a fair trial, holding that the "admissibility of these photographs. . . was an evidentiary question for the state trial judge." The court, citing Lisenba v. California, 314 U.S. at 227-28, acknowledged that "[f]ederal courts do not sit to review state evidentiary questions". 536 F.2d at 108.

Regarding the petitioner's contention that the admission of the photographs violated his rights regarding the imposition of punishment, Oklahoma submits that the exhibits had no crucial or significant impact upon a finding of the aggravating circumstance that the murder was especially heinous, atrocious or cruel.

In the present case the Oklahoma Court of Criminal Appeals found that the

evidence in this case was strong. Thompson v. State, 724 P.2d 780, 783 (Okla. Crim. App. 1986). A review of the facts set forth earlier in this brief show that this finding is obviously accurate.

The jury instruction defining this aggravating circumstance read as follows:

> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

[Emphasis added] (J.A. 21)

The evidence of serious physical abuse in this case is overwhelming. A subsequent autopsy of the body revealed that death was caused by gunshot wounds to the head and the chest (Tr. 667). Other injuries to the body indicated cuts on the left side of the chest, a seventeen centimeter cut on the neck and throat which was about one-half inch in depth, a broken shin bone in the lower

left leg, and multiple abrasions and wounds on the body, particularly on the victim's face and about his arms (Tr. 661).

Considering the evidence of serious physical abuse in this case, Oklahoma contends that the admission of the photographs did not prevent the petitioner from having a fundamentally fair trial at either stage.

Further evidence that the photographs did not unfairly impassion the jury is the fact that the jury found the existence of only one of the two aggravating circumstances instructed by the court (J.A. 20; Tr. 870). Since the jury declined to find that the petitioner had the propensity to commit criminal acts of violence that would constitute a continuing threat to society, it can hardly be argued that the photographs caused the jury to act irresponsibly in this case.

Finally, for this Court to hold that the photographs in the present case were improperly admitted would require the Court to decide the prejudicial impact of photographs in other death penalty cases.

CONCLUSION

For the reasons stated, it is respectfully requested that the judgment and sentence of the Oklahoma Court of Criminal Appeals be affirmed.

Respectively submitted,

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